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April 26, 2013

VIA ECF

The Honorable Magistrate Judge Joseph A. Dickson
United States District Court
for the District of New Jersey
Martin Luther King, Jr. Building
& U.S. Courthouse
50 Walnut Street, Room MLK 2D
Newark, NJ 07101

Re: *Lincoln Adventures, LLC v. Those Certain Underwriters at Lloyd's London*, No. 2:08-cv-00235-CCC-JAD (Tag-Along in MDL No. 1663)

Dear Judge Dickson:

This joint submission sets forth the respective positions of Plaintiffs in *Lincoln Adventures, LLC v. Those Certain Underwriters at Lloyd's, London*, and Defendants Syndicates 33, 102, 382, 435, 510, 570, 609, 623, 727, 958, 1003, 1084, 1096, 1183, 1245, 1886, 2001, 2003, 2020, 2488, 2623, 2791, and 2987 (the "Defendants") with respect to Plaintiffs' motion to compel further response to Plaintiffs' discovery requests.

I. Plaintiffs' Position

A. Introduction

Defendants refuse to provide core discovery to Plaintiffs and force them to again seek the intervention of the Court for the production of basic discovery materials. *See* Dkt. No. 2201 (ordering Defendants to respond to discovery on a class-wide rather than individual basis). Though Defendants have been on notice for many months of Plaintiffs' discovery requests and the scope of the well-pleaded allegations contained in the Complaint,[1] Defendants refuse to produce obviously relevant documents and data and have hidden-through careful and misleading language and partial productions-the fact that they were not producing this information. Only now have Plaintiffs discovered after

[1] Revised First Amended Class Action Complaint ("Complaint"), Dkt. No. 2312.

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reviewing Defendants' productions that what they thought was being produced by Defendants, was in fact not.

At its simplest, this case is about the Defendants agreeing amongst themselves to pay kickbacks – undisclosed to U.S. insurance purchasers – to brokers in exchange for guaranteed streams of lucrative business. As the Complaint details, these payments have a variety of names and forms, but the important feature they all share is that they are not in exchange for real services of value and are paid in addition to standard brokerage or commissions. Throughout the case, Plaintiffs have consistently defined these agreements as "contingent commission agreements" or "compensation agreements," including among them "coverholder agreements," "binding authorities," and lineslips which provide for the payment of commissions contingent on certain volume or profit goals. These are all terms that have been understood and used throughout the litigation by all the parties.

Unfortunately now, Defendants have finally revealed to Plaintiffs in the meet and confer process about the missing documents and data that they unilaterally chose not to produce – documents and data concerning certain types of agreements that are clearly alleged in the Complaint and within the scope of Plaintiffs' discovery requests and the definitions contained therein. Defendants justify their self-serving strategy by arguing that Defendants interpret these agreements as falling outside of Plaintiffs' case. As a result, Defendants have produced patently incomplete discovery responses. Plaintiffs' definition of the types of agreements at issue in this case is straightforward and clearly set forth in the Complaint. Defendants' willful and disingenuous redefinition of these terms is simply a last-ditch effort to prevent Plaintiffs from proving their case by not producing the fundamental discovery needed to establish their claims.

Plaintiffs' motion should be granted for three separate and independent reasons. ***First***, the documents and data that Defendants seek to shield from discovery is plainly relevant and has been at issue in both the original and amended complaints, multiple discovery requests, deposition questioning, and the subject of multiple meet and confers. Defendants' refusal to provide this information violates Black letter law regarding the permissible scope of discovery. ***Second***, Defendants have relied on the agreements being a part of the case in making arguments in their submissions to the Court, including in their motion to dismiss and its prior unsuccessful opposition to Plaintiffs' discovery motions. Defendants should not be permitted to use the purported lack of evidence as a result of their refusal to produce relevant documents as both a sword against Plaintiffs' claims and a shield to prevent Plaintiffs from establishing liability. ***Third***, Defendants have already provided to Plaintiffs some, but not all, of this information. Defendants' self-selected partial production of these materials is an admission of the relevance of these documents and constitutes a waiver of objection to their production.

Through this letter submission, Plaintiffs respectfully ask the Court to order Defendants to provide the discovery that they should have provided in the first place. To effectuate their reasonable

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request, Plaintiffs respectfully ask the Court enter the Proposed Order (attached as Exhibit 1), which orders Defendants to meet and confer with Plaintiffs concerning search terms to run across the electronic and hard copy files for appropriate custodians to obtain the relevant documents and not exclude documents in their relevance review because of an artificially narrow definition of "contingent commissions." Plaintiffs also request that documents and data be produced reflecting contingent commission payments made pursuant to these agreements.

In large part due to Defendants' improper conduct in hiding relevant documents and data, Plaintiffs plan to request an extension of deadlines in the case in a separate submission to be filed in advance of the May 8, 2013 Status Conference.

B. Background

On April 19, 2013, during a meet and confer with the counsel for 17 of the Defendants, Plaintiffs learned, for the first time, that Defendants had not provided information regarding certain types of agreements at the core of the Complaint.

In advance of the parties' meet and confer, Plaintiffs' experts reviewed the data Defendants produced. Based on that review, Plaintiffs suspected that not all data reflecting all payments made pursuant to contingent commission agreements were produced by Defendants. To this end, Plaintiffs requested that Defendants confirm that the data produced contained all information regarding contingent commission payments made (including those made pursuant to lineslips and binding authority agreements). During the meet and confer process, Defendants said that information relating to most contingent commissions were not relevant to Plaintiffs' claims and that they did not consider any "on slip" payments to be at issue in the case. They further explained that they ***only*** considered traditional MSAs and PSAs[2] with contingent commission clauses as the type of agreements at issue in the case.

Accordingly, Defendants admit that they have not produced all data or documents relating to agreements where payments were made pursuant to contingent commission agreements as defined in the Complaint. In particular, Defendants have not produced: (1) all lineslips and relevant documents and data concerning the lineslips, including documents and data relating to the bidding, negotiation and payments made pursuant to these agreements (as well as other documents and data otherwise responsive to Plaintiffs' discovery requests relating to lineslips); (2) all binding authority or coverholder agreements and relevant documents and data concerning these agreements, including documents and data relating to the bidding, negotiation and payments made pursuant to these agreements (as well as

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[2] Market Service Agreements and Placement Service Agreements, respectively.

other documents and data otherwise responsive to Plaintiffs' discovery requests relating to binding authority or coverholder agreements); and (3) all agreements which contain a profit- or volume-based commission separate and in addition to standard brokerage or commissions, or agreements which contain a non-standard brokerage between multiple Syndicates (for example, a "profit commission"), including documents and data relating to the bidding, negotiation and payments made pursuant to these agreements. Defendants' withholding of these materials is improper and should be compelled by this Court to be produced by a date certain.

C. Argument

Under Federal Rule of Civil Procedure 26(b), a court may compel discovery of any matter relevant to a party's claims, defenses, or the subject matter involved in the action, provided that the court finds good cause. Fed. R. Civ. P. 26(b). In determining good cause, this District interprets Rule 26(b) liberally as "creating a broad vista for discovery 'to encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Tele-Radio Sys., Ltd. v. De Forest Elecs., Inc.*, 92 F.R.D. 371, 375 (D.N.J. 1981) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

1. Contingent Commission Agreements Are Plainly Fundamental to Plaintiffs' Claims

First, a quick review of the Complaint shows that Plaintiffs challenge the anti-competitive and conspiratorial practices that cropped up amongst the Syndicates around the payment of contingent commissions by the Syndicates. The contingent commission documents and data at issue are not simply relevant in that they reasonably could lead to other matters that could bear on any issue in the case. Indeed, Plaintiffs allege that these documents will directly help to establish the anti-competitive and conspiratorial conduct alleged in the Complaint.

Further, in the Complaint, Plaintiffs define the "contingent commission" agreements that are relevant to the Complaint, as any type of brokerage that ***does*** "provide for the payment of contingent commissions," including:

> Placement Service Agreements ("PSAs"), Marketing Service Agreements ("MSAs"), Carrier Service Agreements ("CSAs"), Preferred Market Agreements ("PMAs"), Insurer Services Brokerage Agreements ("ISBAs"), Portfolio Service Agreements, Market Service Lineslip Agreements, Contingent Income Agreements, Binding Authority Statements, Overrider Agreements, Overriders, Compensation for Services Agreements, Service Fee Agreements, Supplemental Compensation Agreements, Additional Revenue

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> Payments, Additional Remuneration Payments, Enhanced Remuneration Agreements, Compensation for Services to Underwriters, Lineslip Agreements, Market Service Lineslip Agreements, Facilitation Agreements or Lineslips . . . .

Complaint, ¶10. The Contingent commissions agreements or payments made pursuant to these "Compensation Agreements" that contain contingent commission clauses are further defined throughout the Complaint, including binding authority and lineslip agreements. *See id.*, ¶¶138-139 (detailing an example of a binding authority agreement and explaining why it is anticompetitive). Notably, every one of Plaintiffs' claims stand, thereby undercutting Defendants' ill-founded argument that some claims are not subject to discovery.

Further, the Complaint painstakingly describes how the binding authority agreements, coverholder agreements, lineslip agreements and other agreements with contingent commission clauses (which Defendants now contest the relevancy of) are at the heart of Plaintiffs' claims.[3] Put simply, Defendants cannot credibly argue that these agreements are not relevant.

Plaintiffs clearly include allegations concerning binding authorities and coverholder agreements in their Complaint, and the parties have put forward various arguments about these agreements in the motion to dismiss submissions. *See* Complaint, ¶70; Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint dated December 4, 2012 ("Defs. Mem.") at 22-23; Dkt. No. 2158 at 15 (Defendants' Position in Plaintiffs' Motion to Compel). Defendants argue that these agreements are agency agreements, and thus there cannot be a contingent commission payment that occurs between a broker and a Syndicate. This is wrong for two reasons. First, coverholders frequently use brokers to sell their risks to U.S. insureds, thus, the agreement puts the Syndicate in privity with brokers. Second, despite the agency agreement, coverholders ***act*** as the broker as far as the U.S. insured is concerned, and do not disclose their relationships to the insured. For this reason, Plaintiffs and other entities such as the European Commission have found these types of agreements to create conflicts of interest for broker intermediaries.

Additionally, Defendants argue that binding authorities and coverholder agreements do not contain contingent commission clauses, arguing that "profit commissions" are not contingent commissions, despite being contingent on certain levels of profit. Leaving aside the fact that this is an

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[3] Additionally, in Plaintiffs' September 2012 motion to compel discovery because of Defendants' improper objections, Plaintiffs argued that "[t]he existence of a coverholder agreement does not negate allegations that a contingent commission was paid by a Syndicate." Dkt. No. 2158 at 8. The idea that these agreements are central to the case is certainly not a new one. Footnote 19 proves that Defendants understood Plaintiffs' claims to include these agreements as early as 2007.

issue for summary judgment, not a discovery dispute, the argument itself demonstrates that Defendants acknowledge that details regarding the agreements themselves and the documents and data about those agreements, are at issue in this case.[4]

But, even assuming *arguendo* that Defendants' contentions are correct, which they are not, and the contingent commission agreements at issue cannot form the basis for relief, that still does not prove that they are unlikely to lead to admissible evidence. The Complaint alleges that these agreements are evidence of the "rim" – that is, the horizontal agreements – thus, these agreements constitute evidence that directly supports Plaintiffs' antitrust claims. *See, e.g.*, Complaint, ¶137. Tellingly, Defendants again acknowledge their relevance by arguing in their motion to dismiss (which has yet to be submitted to the Court), that these documents do not provide a basis on which relief can be granted. Defs. Mem. at 26 ("Binding authority agreements are, on their face, agreements among insurers, but contrary to Plaintiffs' suggestion, that fact alone does not render them 'horizontal agreements' in violation of antitrust law."); *see infra*, §I.C.2.

In short, not only are Defendants clearly on notice that any agreements (and related documents) that have contingent commission clauses are relevant to the claims in the Complaint, but they admit through their conduct that this information is at issue, is relevant, and is thus readily discoverable.

2. Defendants Rely on the Relevance of the Disputed Discovery in Briefing

Defendants know that the various types of contingent commission agreements are relevant to Plaintiffs' claims, not only because the Complaint is replete with allegations about these types of contingent commission agreements, but also because they have used the existence of these agreements against Plaintiffs.

In their motion to dismiss, Defendants admit that they understand Plaintiffs' claims to be challenging the exact type of agreements of which Plaintiffs seek discovery. There are many examples in Defendants' motion to dismiss which demonstrate that Defendants understand Plaintiffs' claims to include binding authority agreements to be not only relevant to Plaintiffs' case, but key to certain elements of their claims. A few examples include the following:

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[4] Notably, Defendants do not contend that lineslips did ***not*** contain contingent commission clauses. Lineslip agreements are thus clearly relevant. Syndicates 570 and 609, 2001, 2488, and 2791, represented by four separate law firms, concede that lineslips are within the proper scope of discovery. Only the Syndicates represented by Ropes & Gray, Syndicates 33, 102, 382, 435, 510, 623, 727, 958, 1003, 1084, 1096, 1183, 1245, 1886, 2003, 2020, 2623 and 2987 argue that lineslips are not even relevant.

- Defendants argue that coverholder agreements only demonstrate "an ***opportunity*** to conspire" (*see* Defs. Mem.at 3) (emphasis in original);

- Defendants argue: "Plaintiffs also rely on…the delegation in some instances of underwriting authority to a third party in so-called 'coverholder' agreements" (*see id.*);

- Defendants state: "Plaintiffs also point to binding authority agreements to allege the Syndicates 'join together' to enter into multilateral contingent commission agreements,"(*See id.* at 8) (citations to Complaint omitted);

- Section of Defs. Mem. entitled "Binding Authority Agreements" (*see id.*, §I.1.b. at 22-25);

- Defendants note that Plaintiffs "attempt[] to classify 'binding authority agreements' as illegal" (*see id.* at 22); and

- Defendants contend "Plaintiffs also attempt to misconstrue a portion of the coverholder's compensation known as a 'Profit Commission' to be the equivalent of a contingent commission." (*See id.* at 24).

Additionally, in their prior (and notably unsuccessful) motion to limit the scope of discovery in this case before Judge Shwartz, Defendants argued that, because binding authority agreements contained a different type of contingent commission, Plaintiffs lacked standing. *See* Dkt. No. 2158 at 15 ("In a binding authority agreement, by contrast, a group of Lloyd's syndicates enters into an agreement with a coverholder. In that agreement, which may be arranged by a specialized broker in the Lloyd's market, the syndicates authorize the coverholder to bind risks under certain conditions.").

Defendants cannot now, after having repeatedly recognized the centrality of coverholder and binding authority agreements in this case, seriously contend that they are not relevant to Plaintiffs' claims and thus not subject to discovery.[5]

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[5] *See Bd. of Trs. v. Tyco Int'l, Ltd.*, 253 F.R.D 521, 522 (C.D.Cal. 2008) (motion to compel the production of settlement agreements granted where party previously relied upon and cited the past agreements to support its claims in litigation); *In re Fedex Ground Package Sys., Inc., Employment Practices Litig.*, No. 3:05-MD-527, MDL-1700, 2009 WL 4730574, at*2-*3 (N.D. Ind. Dec. 4, 2009) (granting plaintiffs' motion to compel where defendants previously relied in litigation on similar documents for other purposes).

3. Defendants Admit the Documents Are Relevant

In addition to admitting the relevance of the discovery by repeatedly referring to it in their briefing, Defendants have already produced dozens of these documents,[6] thereby waiving any relevance objection they may have once had.[7] By producing many of the agreements, Defendants admit that the documents are relevant, and cannot now credibly contend that the documents were inadvertently produced, especially considering they made no efforts to argue against the relevance of the documents until several months after their production.

4. Defendants' Arguments Miss the Point

For the most part, Defendants rehash old arguments made in their motion to dismiss or they make arguments they neglected to make in their motion. Of course, a motion regarding relevance of discovery is the wrong place for making arguments about the sufficiency of a Complaint to state claims on which relief can be granted. Indeed, the similarity of Defendants' motion to dismiss and this motion lends credence to the relevance of the claims in the Complaint.

Likewise, any claim by Defendants that Plaintiffs should have raised these issues earlier even if it were possible or true, which it is not, is of no moment as Plaintiffs are raising this dispute before the discovery dispute deadline. Regardless, this dispute being raised now is entirely of Defendants' own doing. Leaving aside that this issue arose only after Plaintiffs' experts manipulated and reviewed the varied data productions (equivalent of 5 million pages of documents, according to Defendants' brief), during a meet and confer on October 12, 2012, Defendants represented to Plaintiffs that they were not withholding production of any documents on any scope grounds. This, combined with Defendants' partial production, led Plaintiffs to reasonably and understandably believe that these types of documents were searched for and produced. Defendants' arguments that Plaintiffs were on notice of these scope objections (which were never raised outside of carefully-worded objections until last week) are belied by their conduct.[8]

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6 *See* Exhibit 2 (list of some of the binding authority agreements already produced).

7 *See United States. v. Jackson*, 155 F.R.D. 664, 666 (D. Kan. 1994) ("The defendants represented in their brief that the prosecution provided these documents to them on April 18, 1994. Having already produced all or most of these documents, the prosecution has waived its objection [to the materiality of impeachment evidence]. The court orders full disclosure of the third group of documents.").

8 *See Howard v. Sweetheart Cup. Co.*, No. 00 C 648, 2001 U.S. Dist. LEXIS 8682, at*6-*8 (N.D. Ill. June 27, 2001) (Court found that defendant could not pick and choose the documents they thought were relevant by giving cleverly-worded responses to a request. "If an attorney wants to withhold documents requested under the discovery rules, he must do so in a

D. Conclusion

The fact that Defendants dislike Plaintiffs' challenge to their practice of paying contingent commissions through various forms of agreements in this case – a practice which has been investigated in the United States and abroad and has resulted in over a billion dollars in criminal and civil settlements – does not provide them a basis to refuse to give Plaintiffs discovery to which they are entitled in this nationwide class action.[9] For this reason, Plaintiffs respectfully request the Court enter the Proposed Order attached as Exhibit 1.

II. Defendants' Position

Calling them "Contingent Commission Agreements," Plaintiffs seek two types of agreements — lineslips and binding authority agreements — that have nothing to do with their theory of the case. Because Plaintiffs utterly fail to explain how these agreements are relevant to their theory— but instead obliquely reference their deficient complaint — the Syndicates should not be required to engage in a second round of extremely costly, pre-motion to dismiss discovery.[10]

Lincoln Adventures is a putative class action and a tag-along case pending in this multi-district litigation. The defendants in this action consist of 23 syndicates of Underwriters at Lloyd's (the "Syndicates"). The two named plaintiffs purport to assert claims on behalf of a putative class consisting of all U.S. insureds that purchased insurance in the Lloyd's marketplace at any point in the past fifteen years. The theory of Plaintiffs' case is that insurance brokers conspired with the Syndicates, and the Syndicates conspired with one another, so that the brokers would direct to certain insurers business that the brokers were to place on behalf of their policyholder clients. In exchange for delivering this business, Plaintiffs allege that the brokers were paid what they refer to generically as

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straightforward and forthright manner, not by artful phrasing that obscures more than it discloses." Moreover, the court found that where documents are among the core issues in the case, counsel had no proper basis to withhold any of the documents.).

9 *See Sunterra Corp. v. Perini Bldg. Co.*, No. 2:04-cv-00784-MCE-EFB, 2009 U.S. Dist. LEXIS 13914, at *24-*25 (E.D. Cal. Feb. 23, 2009) (granting motion to compel and holding that "narrow interpretation" of a term at issue would not be imposed and finding "the relevance of such discovery is governed by Rule 26, not [the party's] proposed limitations").

10 All of the Lloyd's Syndicate defendants in *Lincoln Adventures* join this submission and oppose Plaintiffs' request. Plaintiffs erroneously suggest that the dispute is limited to a subset of the Syndicate defendants. To the contrary, all of the Syndicates reject Plaintiffs' overly broad definition of what is relevant or discoverable in this action. Syndicates 570, 609, 2001, 2488, and 2791 also reject Plaintiffs' characterization of their position; they have never acceded to Plaintiffs' definition of a "contingent commission" agreement, which would compel them to produce all binding authority agreements and lineslips.

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"contingent commissions." *See* Am. Compl. (Dkt. 2312) at ¶¶ 9-13, 115, 128-33. Identical allegations in the original commercial class action in this MDL were dismissed because the alleged conduct was legitimate business activity. That dismissal was affirmed by the Third Circuit in 2010. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010). Upon receiving the necessary leave from the Court, the Syndicates moved to dismiss Plaintiffs' complaint in December 2012. Plaintiffs did not serve their opposition to this motion until March 2013, and the return date for the motion to dismiss is May 6, 2013.

The present dispute concerns Plaintiffs' attempts to expand the scope of discovery well beyond the theory on which they base their antitrust and RICO claims or anything relevant to the claims or defenses in this action. Plaintiffs allege that, through contingent commission agreements, "the Lloyd's Broker promised to steer certain volumes of business or entire classes of business [to the Syndicates] in exchange for a kicker." *See* Am. Compl. ¶ 13. In the London insurance market in which the Syndicates do business, certain of the Syndicates entered into agreements with brokers, most often applicable to a specific line of business (*e.g.*, property or marine insurance), pursuant to which the broker provided specified services in exchange for compensation, which typically was based on volume of premium. These agreements were known by different names, most commonly placement services agreements and market services agreements (collectively referred to herein as "PSA/MSA Agreements"). Plaintiffs equate the PSA/MSA Agreements to contingent commission agreements entered into by U.S. insurers that were the subject of investigations by the New York Attorney General and that were the basis for the original commercial class action in this MDL.

Plaintiffs are seeking broad class-wide discovery regarding what they refer to as Contingent Commissions Agreements, which they defined to include not only the PSA/MSA Agreements but also two other types of agreements commonly used in the London insurance market — binding authorities and lineslips — that do not implicate the broker compensation practices around which Plaintiffs attempt to construct their claims.[11] Plaintiffs' attempt to obtain discovery regarding these agreements is the subject of the present discovery dispute. As outlined in detail below, Plaintiffs are attempting to impose a significant and unreasonable discovery burden on the Syndicates for documents that are in no way relevant to Plaintiffs' claim that the Syndicates paid brokers to direct or allocate business to them. Because their request would require the extensive review and production of binding authorities and lineslips (and innumerable related documents) that are not relevant, the Syndicates consistently and repeatedly objected to such requests. Only now, shortly before the close of fact discovery, have Plaintiffs challenged these objections.

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[11] The terms "binding authority agreement" and "coverholder agreement" are synonymous, and Plaintiffs have used them interchangeably. For clarity and consistency, the Syndicates' submission will refer only to the former term.

A. Plaintiffs' Requests Bear No Relevance To This Case

The documents Plaintiffs seek are not relevant to any claims or defenses in the action and their production would impose an unreasonable and undue burden on the Syndicates that would serve only to further extend this long-running MDL. The lineslips and binding authority agreements at issue here are fundamentally different from the PSA/MSA Agreements: lineslips are addressed to the efficient underwriting of smaller risks and binding authority agreements have nothing whatsoever to do with the brokering of insurance policies. Plaintiffs' requests seek thousands of agreements entered into by the Syndicates across an eleven-year discovery period, but offer no explanation as to how these agreements advance any cognizable theory of liability in this case. Instead, Plaintiffs offer the tautology that, because they have mentioned binding authorities and lineslips in their Amended Complaint, all such agreements spanning the entire putative class period are relevant. They further assert, without support, that the Syndicates have conceded relevance by attacking those same allegations mentioning these agreements in their motion to dismiss, which sets forth why the Amended Complaint does not state a claim for relief.[12] These arguments do not address the threshold question that Plaintiffs must answer, which is why the documents are relevant to their claims.

The expansive and costly discovery Plaintiffs seek is not warranted at any stage of the litigation, let alone where the Court has not yet determined that Plaintiffs' complaint states a claim and there is a dispositive ruling from the Third Circuit rejecting essentially identical claims previously asserted in this very same MDL. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (recognizing that, given the expense inherent to antitrust discovery, the Court must "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed") (internal quotation marks and citations omitted).

1. Binding Authority Agreements Have Nothing To Do With The Brokering of Insurance Policies

Plaintiffs' substantive claims are premised on the contention that Marsh, Aon and Willis received improper compensation in connection with insurance policies for which they acted as a broker for the insured or policyholder. Binding authority agreements, however, relate to the underwriting, not

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12 The Syndicates' motion to dismiss was served on December 4, 2012, and it will be filed, together with Plaintiffs' opposition and a reply brief, on April 30, 2013. In addition to the substantive problems with Plaintiffs' assertions, their selective quotations from the motion do not reflect its content. Indeed, the motion explicitly addresses and rejects the claim that the sought-after agreements are relevant. *See, e.g.*, Memorandum of Law in Support of Defendants Syndicates Motion to Dismiss the Revised First Amended Class Action Complaint at 23 ("The very documents on which Plaintiffs' allegations are based show that binding authorities *are not* contingent commission agreements among the Syndicates") (emphasis added).

brokering, of insurance policies and do not involve any party acting on behalf of a policyholder. Pursuant to these binding authorities, Lloyd's syndicates delegate to an agent — known as a coverholder — the authority to underwrite or bind certain types of risks on their behalf, with each syndicate agreeing to accept a certain percentage of any risk underwritten by the coverholder. The coverholder's authority levels typically are limited and thus suited to smaller risks that otherwise could not be underwritten cost-efficiently in the London insurance market.

Discovery into binding authorities is plainly irrelevant because coverholders and insurance brokers perform two distinct functions. Significantly, coverholders do not provide brokerage services, rather they provide underwriting services. In short, coverholders are agents for the syndicates. They are "authorized by Lloyd's syndicates to enter into contracts of insurance and/or issue insurance documentation on their behalf."[13] These agreements are common within Lloyd's, as evidenced by the directory listing thousands of coverholders on the Lloyd's website.[14] In contrast to coverholders, brokers are the policyholders' agents and shop for and recommend insurance contracts to their policyholder clients.

In response, Plaintiffs argue that coverholders supposedly "use" brokers to sell their risks to U.S. insureds and coverholders purportedly "act as the broker" so far as U.S. insureds are concerned. Leaving aside the inconsistency between the two arguments, as to the first point, coverholders, like any other insurance provider, may deal with brokers seeking insurance coverage for their clients. This fact does not give rise to an agency or contractual relationship between the coverholder (acting as the syndicates' agent) and the broker (acting as the insured's agent). Moreover, the documents Plaintiffs now seek will not provide any information regarding any such coverholder/broker interaction. As to the second point, Plaintiffs provide no basis for the claim that coverholders act as brokers. Any insured wanting to purchase a policy through a coverholder typically does so through its own broker. *See* Lloyd's.com, http://www.lloyds.com/Lloyds/Offices/Americas/US-homepage/Placing-Risk/How-to-access-Lloyds (last visited April 26, 2013).

The binding authorities provide for payment by syndicates to the coverholders for the services the coverholders perform in underwriting risks and in issuing related documentation. For present purposes, the important difference between PSA/MSA Agreements and binding authority agreements is that the coverholders under the binding authorities are agents of the insurers and typically are required

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13 *See* http://www.lloyds.com/Lloyds/Offices/Americas/US-homepage/Placing-Risk/How-to-access-Lloyds (last visited Apr. 26, 2013).

14 *See* http://www.lloyds.com/Lloyds/Offices/Americas/US-homepage/Placing-Risk/How-to-access-Lloyds (last visited Apr. 26, 2013).

to exercise underwriting discretion. Plaintiffs' allegations exclusively relate to payments to brokers. None of them relate to payments to underwriting agents. Ignoring this critical distinction, Plaintiffs suggest, in conclusory fashion, that binding authorities supposedly involve "contingent commissions."

Certain binding authorities contain compensation provisions whereby the coverholders share a portion of the profits from the accounts they underwrite. These compensation provisions, sometimes referred to as profit commissions, bear no resemblance to the volume-based broker contingent commission agreements that are the focus of this action. Simply put, they are not compensation paid to broker, an agent of an insured, but instead are payments to coverholders who act as the *agents of the syndicates*. Moreover, this compensation is not as a reward for supposedly driving volumes of business, but for exercising their underwriting discretion well. Indeed, binding authorities differ from the "open market" placements in the London insurance market where the insured's retail broker (*e.g.,* Marsh, Aon, or Willis) solicits quotes directly from the syndicates and often can influence which syndicates are selected to underwrite a risk. For placements under a binding authority, the insured and its retail broker do not interact with any Lloyd's syndicate directly, but rather communicate with the coverholder, which is acting on behalf of the syndicates. Such arrangements simply do not present any potential for "steering" that Plaintiffs allege in their complaint. Accordingly, binding authorities cannot, and do not, represent a horizontal agreement among syndicates purportedly evidencing the alleged conspiracy here — what Plaintiffs refer to as a "rim" — because they do not involve any payment of any incentive to a broker that could possibly encourage any "steering" of their clients.

Plaintiffs' sweeping demand for all binding authority agreements seeks production of voluminous documents irrelevant to their claims. Particularly given the burdensome and irrelevant nature of the request and the belated objection raised by Plaintiffs, the application for this discovery should be denied.

2. Lineslips Are Nothing More Than A Mechanism For The Efficient Placement of Certain Types of Insurance

The second category of documents sought by Plaintiffs is all lineslip agreements entered into by the Syndicates during the discovery period, an expansive request covering the period from 1997 to 2007. In the London insurance market, a slip is the document by which one or more syndicates agree to terms set forth in an abbreviated fashion under which a single risk will be insured. As a general matter, lineslips are a facility for underwriting not a single risk but a large number of similar (typically smaller) risks on specifically defined terms. Lineslips do not apply to an entire line of business, but rather allow syndicates and a broker to agree that, for a specified type of risk, the broker need only approach certain underwriters on the lineslip, who may accept risk on behalf of the other underwriters who have signed on to the lineslip. *See* C. Bennett, *Dictionary of Insurance* (Pitman 1997). This structure is "prompted by administrative convenience." *Id.* Lineslips allow for the underwriting of smaller risks that otherwise

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might not be worth the expense of soliciting quotes separately from a variety of syndicates. They also allow insurers to spread risks, which makes it possible to insure a large number of risks that a single insurer could not underwrite in their entirety.

As an initial matter, the absence of any relevance of lineslips to this action is evidenced by Plaintiffs' own complaint:

- Plaintiffs' complaint uses the term lineslip only in *one* paragraph, *see* Am. Compl. ¶ 10, and Plaintiffs offer no further specific description of how lineslips relate to their allegations.
- None of the purportedly representative plaintiffs obtained insurance off of a lineslip or, for that matter, had policies that were the subject of contingent commission payments (however that term is defined). The policies for the two named plaintiffs, Lincoln Adventures, LLC and Michigan Multi-King, Inc., were placed through variations of binding authority agreements on which no broker contingent commissions were paid.
- None of the regulatory investigations on which Plaintiffs rely so heavily in their complaint involved lineslips. *See* Am. Compl. ¶¶ 18, 236-40. Indeed, contrary to Plaintiffs' suggestion in their submission, which, like their complaint, relies on U.S. regulatory investigations, there have been no regulatory settlements or criminal indictments implicating the London market.
- Lineslips do not contain confidentiality provisions, a feature of purported contingent commission agreements that is essential to Plaintiffs' claims and thus is featured significantly in the complaint. *See, e.g.,* Am. Compl. ¶¶ 183-99.

In their submission as provided to the Syndicates, Plaintiffs offer no further explanation of the purported relevance of lineslip agreements, other than an unexplained suggestion that lineslips represent a "horizontal agreement" among syndicates. The suggestion is flawed in two respects. First, lineslips represent multiple agreements between the broker and *individual* syndicates to underwrite a certain percentage of a defined type of risk on specified terms; the broker presents the proposed facility to each prospective syndicate, which either accepts or declines to participate on those terms and conditions based on its own business judgment.

Second, the vast majority of lineslips involve a flat commission to the broker, and do not base broker commission percentages on the volume of premium underwritten. This compensation of the broker consists of a non-contingent commission calculated as a flat percentage of the premium underwritten for all risks under the lineslip. This commission is no different from the commission paid pursuant to a slip for the placement of an individual risk. Plaintiffs expressly exclude such commissions from their discovery requests, *see* Plaintiffs' First Request for Production of Documents, Definition No. 3, and even state above that contingent commissions are payments made in addition to

"standard" brokerage payments. These lineslips thus are not even responsive to Plaintiffs' document requests, much less relevant to the claims at issue in this action.

In certain limited instances, lineslips also included an additional compensation provision under which the broker received additional revenue based on the volume of premium written under the lineslip.[15] Such volume-based compensation provisions are not new or unique to Lloyd's, or the insurance industry generally, contrary to Plaintiffs' suggestion they were the product of some conspiracy among the Syndicates named as defendants here. Setting aside whether they are within the scope of discovery, dozens of this type of lineslip have been produced as responsive to a number of Plaintiffs' requests. *See*, *e.g.*, Plaintiffs' First Request for Production of Documents, Request No. 3 (seeking documents reviewed as part of any internal investigation). Plaintiffs already have many of these lineslips – a fact that only highlights their failure to offer any coherent explanation of their relevance.[16] Requiring any further production of these documents is cumulative and should not be required, *see* Fed. R. Civ. P. 26(b)(2)(C)(i); *In re Merck & Co., Inc. Secs., Derivative & ERISA Litig.*, No. 05-02367, 2012 WL 4764589, *9–10 (D.N.J. Oct. 5, 2012), especially in light of the lack of relevance described above and the burden of such additional production described below.

B. The Record of Discovery to Date Refutes Plaintiffs' Claim of Surprise

For at least the last nine months, Plaintiffs have known that the Syndicates object to, and have not produced documents pursuant to, the expansive, overbroad definition of "Contingent Commission Agreements" set forth in Plaintiffs' pleadings and discovery requests. In July 2012, the Syndicates responded to Plaintiffs' wide-ranging document requests. Among other objections, the Syndicates took the position that class-wide discovery was premature and inappropriate. The Syndicates also objected to Plaintiffs' expansive definition of Contingent Commission Agreements as overly broad, vague, and ambiguous. In addition to these broad objections, many Syndicates specifically objected to Plaintiffs'

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15 In other instances, lineslips include a compensation provision in which the broker receives additional compensation based on the *profitability* of the risks underwritten on the lineslip. This type of lineslip creates an incentive for a broker to carefully select the risks he offers the insurers on the line for underwriting. This type of commission has a totally different economic rationale and effect than Plaintiffs allege, and it has not been the subject of any regulatory investigation or even Plaintiffs' complaint.

16 Plaintiffs suggest that the production of certain lineslips is an implicit concession that all lineslips are relevant. The Syndicates' discovery responses directly refute this assertion. *See, e.g.,* Certain Syndicates' Responses and Objections to Plaintiffs' First Request for Production of Documents, Objections 12 and 21 (objecting to the demand for "lineslips" as "overbroad and not reasonably calculated to lead to the discovery of admissible evidence," and expressly stating that if "any document falling within such an objection is produced by the Responding Syndicates, the production is inadvertent and does not constitute a waiver of the objection").

attempt to seek discovery of all lineslips as overbroad and not reasonably calculated to lead to the discovery of admissible evidence and opposed the production of binding authority agreements and other agreements to which brokers were not parties.[17]

The Syndicates reiterated their position in their opposition to Plaintiffs' briefing in support of class-wide discovery, and Plaintiffs did not challenge it. *See* Dkt. 2158 at 10, n.16. Moreover, in seeking to compel the Syndicates to provide class-wide discovery, Plaintiffs failed to raise any issue with the Court regarding the Syndicates' objections to the scope of what Plaintiffs considered contingent commission agreements. In September 2012, before the Syndicates had an opportunity to test the adequacy of Plaintiffs' allegations through a motion to dismiss, then-Magistrate Judge Shwartz ordered that the Syndicates provide class-wide discovery for the period from 1997 through 2007. Plaintiffs suggest that during meet and confer discussions following Magistrate Judge Shwartz's order, Defendants represented that they were not withholding production of any documents on "scope" grounds. This suggestion is flatly incorrect. Instead, the Syndicates clearly explained that, although they were working to comply with the Court's order compelling class-wide discovery, they were not withdrawing any of the objections that the Court had not addressed.

By December 2012, the Syndicates had completed the bulk of their production, which in total includes nearly 2 million pages of documents, hundreds of thousands of lines of policy-level data for U.S. insureds for the eleven-year discovery period in response to Plaintiffs' data requests, and responses to extensive interrogatories served by Plaintiffs. As part of this production, the Syndicates have produced all PSA/MSA Agreements that potentially pertained to risks placed by U.S. insureds.

Notwithstanding these Syndicates' clear, repeated and longstanding objections to Plaintiffs' overly broad definition of Contingent Commission Agreement, Plaintiffs did nothing to pursue this issue for months and raised it for the first time in letters that were sent to counsel for the Syndicates beginning on April 17, 2013, mere days before the discovery dispute deadline. Fact discovery closes on July 26, 2013.[18]

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[17] The Syndicates have not attached all of these discovery responses to this submission, but will provide any or all of them if the Court wishes to review them.

[18] Indeed, in October 2007 after the filing of this action, 18 of the Syndicate defendants directed a letter to Plaintiffs pursuant to Fed. R. Civ. P. 11. That Rule 11 letter demanded dismissal of the complaint because the insurance policies associated with the named plaintiffs did not involve "contingent commissions," but rather were issued under forms of binding authority agreements that, as discussed below, did not involve any broker contingent commissions. *See* Exhibit 3 hereto.

C. Granting The Discovery Sought By Plaintiffs Places An Unreasonable and Undue Burden on the Syndicates

Discovery to date has been hugely burdensome for the Syndicates. For example, in addition to the extensive document and data production described above, the Syndicates collected and reviewed the equivalent of over 5 million pages of electronic data from hundreds of custodians in response to Plaintiffs' broad document requests. Plaintiffs now seek to require the Syndicates to revisit their document productions. Based on the lack of relevance of these requests as documented above, Plaintiffs' only purpose in pursuing this discovery can be an effort to increase the cost of litigation. The Court should not permit this. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) (an "important aspect of" the "district courts' power to control multidistrict litigation" is to "prevent predatory discovery . . . [by] ensuring that litigants use discovery properly as an evidence-gathering tool, and not as a weapon"); *see also Twombly*, 550 U.S. at 546 (absent specific, plausible factual allegations, the federal rules serve the "practical purpose of preventing a plaintiff with a 'largely groundless claim'" from demanding discovery "representing an *in terrorem* increment of the settlement value").

Plaintiffs seek discovery for all U.S. policyholders over an 11-year period. Any production of binding authorities or lineslips for this class of policyholders over this length of time would be hugely burdensome. By way of example only:

- For many of the Syndicates, some or all of the agreements are maintained only in paper form, are not searchable in any way, and/or are stored off site given that the relevant period extends back more than 15 years. In some cases, the binding authority agreements and lineslips are not segregated from other types of agreements.

- Further, even where the agreements are available electronically, the systems used by certain Syndicates do not provide the ability to perform keyword searches of the text of those agreements.

- Absent a hand review of each binding authority or lineslip, the Syndicates cannot determine the content of the agreement, including but not limited to the presence or absence of any provision providing for any volume-based compensation.

The significant time and expense of identifying, collecting, reviewing and producing any further and cumulative discovery on these issues far outweighs any possible relevance that the documents Plaintiffs now seek may provide. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2012 WL 1299379 (D.N.J. Apr. 16, 2012) (denying further discovery as unduly burdensome and expensive where extensive discovery had already been permitted and plaintiffs could

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not articulate a "particularized" benefit from or need for further discovery); *Bowers v. Nat'l Collegiate Athletic Ass'n*, No. 97-2600, 2008 WL 1757929, *3–*6 (D.N.J. Feb. 27, 2008); (denying discovery of, at best, "marginally relevant" documents, where burden and expense of production outweighed any likely benefit); *see also* Fed. R. Civ. P. 26 Advisory Committee Note (2000) ("emphasiz[ing] the need for active judicial use of subdivision (b)(2) to control excessive discovery").[19]

Finally, in the parties' exchanges about this dispute, Plaintiffs have alluded to their intention to insist that the Syndicates expand their email searches to additional custodians and additional search terms. As set forth, there is no basis for an expansion of the discovery the Syndicates already have provided at great effort and expense, but at a minimum such issues are not ripe for consideration at present.

D. Conclusion

For the reasons outlined above, the Syndicates respectfully request that the Court deny Plaintiffs' request for additional discovery.

Respectfully submitted,

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[19] To the extent required, the Syndicates stand ready to provide declarations to establish the significant burdens presented by the discovery sought by Plaintiffs as outlined in this submission.

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ECF CERTIFICATION

The filing attorney attests that he has obtained concurrence regarding the filing of this document from the signatories to this document.

Dated: April 26, 2013

By: _s/Carmen A. Medici___________
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be e-mailed the foregoing document or paper via the email distribution service list to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 26, 2013.

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